

Plaintiff James Hayden submits the following Response to the Court’s March 8 Order requesting cross-briefs regarding (1) what is the timing for the copyright owner to make the election between actual damages and profits (17 U.S.C. § 504(b)) and statutory damages (17 U.S.C. § 504(c)), and (2) what determinations are for the jury on evidence adduced at trial and what determinations are for the Court on evidence and argument outside the presence of the jury? (Dkt. #273.)

Under 17 U.S.C. § 504(c)(1), Mr. Hayden “may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages[.]” Such election may be made “at any time before final judgment is rendered,” including “even after a jury has returned a verdict on liability and an award of actual damages.” *Cotter v. Christus Gardens*, 238 F.3d 420, at *4 (6th Cir. 2000). That said, in an effort to streamline the issues for trial, including to simplify the questions for the Court and jury to consider, Mr. Hayden hereby confirms that he is not electing to recover an award of statutory damages. Mr. Hayden will seek a damages award in the form of Take-Two’s profits under 17 U.S.C. § 504(b).

The Parties have both proposed that the amount of Take-Two's profits to be awarded should be determined by the jury on evidence adduced at trial. (*See* Plaintiff's Amended Trial Brief, Dkt. #267-3, Jury Instruction No. 16, #267-4, Proposed General Jury Verdict Form; Defendants' Second Amended Trial Brief, Dkt. #268-3, p. 29, #268-4, p. 7.) This is a factual matter for the jury to decide. *See ECIMOS, LLC v. Carrier Corp.*, 971 F.3d 616, 636 (6th Cir. 2020); *Balsley v. LFP, Inc.*, 691 F.3d 747, 771 (6th Cir. 2012).

Dated: March 14, 2024

Respectfully submitted,

By: /s/ Andrew Alexander

John Cipolla (Ohio Bar No. 0043614)
Daniel McMullen (Ohio Bar No. 0034380)
Todd R. Tucker (Ohio Bar No. 0065617)
Andrew Alexander (Ohio Bar No. 0091167)
Josh A. Friedman (Ohio Bar No. 0091049)
Dustin Likens (Ohio Bar No. 0097891)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
jcipolla@calfee.com
dmcullen@calfee.com
ttucker@calfee.com
aalexander@calfee.com
jfriedman@calfee.com
dlikens@calfee.com

Of Counsel

Kimberly A. Pinter (Ohio Bar No. 0084277)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
kpinter@calfee.com

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2024, a copy of the foregoing was filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, and parties may access this filing through the Court's system.

/s/ Andrew Alexander

One of the attorneys for Plaintiff